Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon's Request to Count Investment	)	CC Docket No. 98-184
In Northpoint Toward Out-of-Region	)	
Merger Obligation	)	

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation submits these comments in response to the Common Carrier Bureau's request in the above-referenced docket.[1] Focal is astounded by the audacity of Verizon's request. Verizon's investment in Northpoint Communications Group ("Northpoint"), was pursuant to a merger agreement, which was never completed because Verizon unilaterally backed out of the agreement. Not only did Verizon never provide service to out-of-region customers through that "investment," Verizon's termination of the merger caused the demise of Northpoint, resulting in consumers *losing* a competitive alternative. Verizon now wants that behavior to count toward its merger commitment to "foster out-of-territory competition." Such a result would be contrary to both the language and the intent of the merger conditions and the Commission should promptly reject the request.

I. Verizon's "Investment" Did Not Foster Out of Territory Competition

When the Commission approved the merger of Bell Atlantic and GTE, it recognized that the joining of those companies would likely "result in a public interest harm by eliminating GTE as among the most significant potential participants in the mass market for local exchange and exchange access services in Bell Atlantic's operating

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[1] Common Carrier Bureau Seeks Comment on Verizon's Request to Count Investment in Northpoint Toward Out-of-Region Merger Obligation, CC Docket No. 98-184 (rel. March 12, 2002).

areas."[2] To mitigate these public interest harms, the Commission approved the merger only upon incorporating a variety of conditions proffered by the parties.[3] These conditions were designed to accomplish five primary public interest goals, one of which was to foster out-of-territory competition.[4] Pursuant to this condition, the Commission required the combined firm to spend a total of at least $500 million "to provide services, including resale, that compete with traditional local telecommunications services offered by incumbent local exchange carriers or to provide Advanced Services to the mass market outside the Bell Atlantic and GTE Service Areas within the United States."[5]

Verizon is now asking that an investment it made in Northpoint pursuant to an agreement to merge, when it unilaterally terminated the agreement and caused Northpoint to file for Chapter 11 bankruptcy protection should be counted toward this commitment. Such a determination would be absurd because Verizon's "investment" in Northpoint does not satisfy the terms of the condition. The merger condition requires that Verizon invest money to *provide* "Competitive Local Services." In this instance, Verizon never provided any services pursuant to its "investment" in Northpoint. Instead of completing the merger with Northpoint, in which case, the merged entity would have likely provided service to customers, Verizon unilaterally terminated the agreement. Indeed, Verizon's behavior toward Northpoint was actually the antithesis of the intent of the merger condition. Instead of fostering competition, Verizon's termination of its merger agreement with Northpoint virtually insured the carrier's demise. Accordingly, not only did Verizon fail to promote competition in outside regions; Verizon eliminated the competitive option for consumers to choose Northpoint as their DSL carrier.

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[2] Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, CC Docket No. 98-184, at ¶ 100 (rel. June 16, 2000) ("Merger Order")

[3] Merger Order, at ¶ 247.

[4] Merger Order, at ¶ 251.

[5] *See* Paragraph 43 of Bell Atantic/GTE merger conditions. *See also* Merger Order, at ¶ 319.

The Commission should also reject Verizon's argument that it receive credit for the investment because it made the investment "in good faith with the expectation that the investment would result in the acquisition of customers outside the Verizon operating area."[6] The merger conditions do not allow credit for investments that do not accomplish the stated purpose--to provide Competitive Local Services. Whether Verizon made the investment in "good faith" is irrelevant when it is undisputed that the investment was never used by Verizon to provide services or acquire customers.

In addition, Focal notes that Verizon's claim of "good faith" is highly suspicious. First, it was Verizon's unilateral decision to terminate the merger with Northpoint, a point that Mr. Evans concedes in his letter. Verizon knew the terms of its merger conditions, and chose to terminate its agreement with Northpoint knowing that such action would insure there would be no combined entity to provide "Competitive Local Services" to customers. Moreover, Verizon's "good faith" in this situation is currently under review. On July 12, 2001, Northpoint filed an Amended Complaint with the Superior Court of the State of California, in which Northpoint alleges that Verizon fraudulently induced Northpoint to enter into the merger agreement with false representations and that Verizon had no intention of ever honoring the terms of the agreement.[7] The courts will decide whether that is true, however, Verizon should not be able to obtain merger commitment credit when its actions harmed rather than promoted competition.

Second, Verizon's good faith with respect to its merger conditions in general is highly suspect. This is not the first time that Verizon has adopted a tortured interpretation of its merger conditions. Verizon has also insisted that its merger condition in paragraph 32 does not permit carriers to adopt intercarrier compensation portions of

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6 *See* letter dated March 7, 2002 from Gordon R. Evans, Vice President, Federal Regulatory, to Carol Mattey, Deputy Chief , Common Carrier Bureau.

7 *See* Northpoint Communications Group v. Verizon Communications, First Amended Complaint for Breach of Contract, Fraud and Negligent Misrepresentation, before the Superior Court of the State of California, City and County of San Francisco (filed July 12, 2001).

interconnection agreements, even though the language specifically permits carriers to adopt “an entire agreement.” Although the Commission recently rejected this interpretation, Verizon’s position has undermined the ability of CLECs to take advantage of that aspect of the merger conditions.[8] Accordingly, the Commission should be very wary of any Verizon claims of good faith.

Focal also notes that Verizon’s hesitance to actually compete out of region underscores the difficulty CLECs have had enforcing the ILECs to comply with the Telecommunications Act of 1996. If the TELRIC prices and unbundling rules for broadband services are as favorable to CLECs as the ILECs claim, one would think that the ILECs would be rushing to compete out of market. However, more than six years after passage of the Act, the ILECs are still neatly competing in their own regions. Even when the Commission requires Verizon to compete, Verizon would rather try to get credit by eliminating a CLEC than actually provide services that compete against another ILEC.

Verizon’s actions fail to comply with both the language and the intent of the out-of-territory merger conditions. Accordingly, the Commission should deny Verizon’s request.

Respectfully submitted,

/s/

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[8] Global NAPs, Inc. v. Verizon Communications, *et. al., Memorandum Opinion and Order*, File No. EB-01-MD-010 (rel. Feb. 28, 2002). The Commission determined that Verizon’s interpretation of Paragraph 32 would render the condition that CLECs be allowed to adopt “entire agreements” virtually meaningless.

Dated March 19, 2002